

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

ERNEST M. GUTIERREZ §

v. § CA. C-07-392

NATHANIEL QUARTERMAN §

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION

The United States Magistrate Judge filed her Memorandum and Recommendation on May 9, 2008 (D.E. 14). Respondent filed objections (D.E. 16). In his objections, respondent takes issue with the Magistrate Judge's finding that petitioner's Fourth Amendment claim was properly exhausted.

Respondent provides controlling legal authority to support his position that petitioner's claim was not properly exhausted. The Court agrees with respondent and finds that it is governed by the Fifth Circuit's holding in *Wilder v Cockrell*, which requires a claim to be fairly presented to the highest state court in order to be exhausted. 274 F.3d 255, 260 (5th Cir. 2001). Petitioner's Fourth Amendment claim, which asserts that petitioner did not voluntarily consent to a search of his house, was not presented to the Court of Criminal Appeals at all. Accordingly, the claim was not exhausted.

Having reviewed de novo the Magistrate Judge's Memorandum and Recommendation, the pleadings on file, and petitioner's objections, the Court accepts the Magistrate Judge's recommended decision except to the extent it conflicts with

Wilder v Cockrell, as cited in the respondent's objections. The Court finds that both of petitioners' claims should be dismissed for failure to exhaust. Accordingly, the Court GRANTS respondent's Motion for Summary Judgment (D.E. 11) and DISMISSES petitioner's habeas corpus petition without prejudice.

The Fifth Circuit permits this Court to *sua sponte* deny a certificate of appealability. *Alexander v Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). The Magistrate Judge recommended that petitioner be denied a certificate of appealability because reasonable jurists would not find it debatable whether the petition states a valid claim of the denial of a constitutional right and that reasonable jurists would not find it debatable whether the district court was correct in its procedural ruling. See *Slack v Daniel*, 529 U.S. 473, 484 (2000). The Court adopts the Magistrate Judge's recommended decision and ORDERS that a certificate of appealability not issue in this case.

ORDERED this 11 day of Aug, 2008.



HAYDEN HEAD
CHIEF JUDGE